

THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF ENVIRONMENTAL SERVICES  
WASTE MANAGEMENT COUNCIL

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In re: North Country Environmental Services, Inc.  
Standard Permit No.: DES-SW-SP-03-002

JUL 07 2003

Docket #03-05WMC

**OBJECTION TO MOTION FOR REHEARING**

North Country Environmental Services, Inc. ("NCES") objects to the motion for rehearing filed by petitioner, the Town of Bethlehem (the "Town"). In support of its objection, NCES states as follows:

I. Introduction

On May 7, 2003, NCES filed a motion to dismiss this appeal. The motion identified legal deficiencies in all four grounds of the Town's notice of appeal. In its objection to the motion to dismiss, the Town made only one argument, namely that without a hearing at which the Town could call and cross-examine witnesses, it would be "denied its rights to appeal . . . ." Objection to Mtn. to Dismiss App. at 2. The Town did not respond, however, to NCES's specific arguments supporting dismissal.

On June 12, 2003, the Waste Management Council (the "Council") issued a decision and order dismissing the appeal. After "carefully considering" both NCES's argument that the Town's appeal was based upon a misunderstanding of the controlling law and the Town's unsupported objection, the Council determined that NCES had met its burden and dismissed the Town's appeal. Order (June 12, 2003) at 3. It is this order dismissing its appeal that the Town now asks the Council to rehear.

In its motion for rehearing, the Town argues that there are “issues of fact” that the Council must resolve. Motion for Rehearing at 2. These “issues of fact” allegedly include “NHDES’s applied definition of RSA 149-M,” the Town’s alleged failure to receive a copy of an unspecified document, and “the opportunity to examine witnesses” regarding DES’s determination that Stage IV provides a substantial public benefit. *Id.* None of these arguments is properly raised for the first time in a motion for rehearing, and they do not constitute a basis for rehearing in any event.

II. Argument

A. *The Town May Not Raise Issues for the First Time on Rehearing.*

The sole basis upon which the Town objected to NCES’s motion to dismiss was that without a hearing on the notice of appeal, it would be deprived of its right to appeal. Obj. to Mtn. to Dismiss App. (5-16-03) at 2. In its motion for rehearing, however, the Town claims that the Council should not have dismissed the appeal because there were “issues of fact” concerning DES’s application of RSA 149-M. The motion for rehearing, then, attempts to raise objections to the motion to dismiss that it did not raise when it objected to the motion on May 16, 2003.

A party may not raise a new issue for the Council to consider for the first time in a motion for rehearing. “It is in the interest of judicial economy to require a party to raise all possible objections at the earliest possible time.” Mountain Valley Mall Assoc’s. v. Municipality of Conway, 144 N.H. 642, 654-55 (2000). If a party fails to raise an argument or issue in its objection to a motion to dismiss, it may not do so for the first time on rehearing. Appeal of Working on Waste, 133 N.H. 312, 317 (1990). The New Hampshire Supreme Court, moreover, will not consider on appeal issues raised for the first time on rehearing. Appeal of Campaign for Ratepayer’s Rights, 133 N.H. 480, 484 (1990).

Here, the Town had an opportunity to set forth any arguments it wished to make in its objection to the motion to dismiss. None of the arguments found in its motion for rehearing, however, appears in its objection to the motion to dismiss. Accordingly, the Council should deny the motion for rehearing.

B. *The Town's Motion for Rehearing Overlooks the Basis Upon Which the Council Dismissed its Appeal, Disregards the Legal Standard That the Council Must Apply When Considering a Motion to Dismiss, and Ignores the Purpose of a Motion to Dismiss.*

Motions to dismiss must be decided based upon the pleadings and the law. When a party files a motion to dismiss, the council “ ‘must rigorously scrutinize the [notice of appeal] to determine whether, *on its face*, it asserts’ ” a valid claim for relief under the law. Emphasis in original. Kennedy v. Titcomb, 131 N.H. 399, 401 (1989), *citing* Jay Edwards, Inc. v. Baker, 130 N.H. 41, 44-45 (1987) (describing supreme court's review of dismissal by superior courts). If the facts as alleged by the Town do not “establish a basis for legal relief,” dismissal is proper, and the supreme court will not disturb the council's findings on appeal. Scheffel v. Krueger, 146 N.H. 669, 671 (2001) (in context of supreme court review of superior court dismissal).

The Council correctly applied the above standards. The Town's notice of appeal incorporated a number of exhibits. On their face, the exhibits forming the basis of the Town's notice of appeal contained information that demonstrated that the Town's claims for relief were based upon mistaken assumptions and misinterpretations of the governing law. Not only did the Town fail to allege facts that demonstrate a valid claim for relief under a correct understanding of the law, but the Town also misstated the law and alleged facts that demonstrated that the Town *is not* entitled to relief. Therefore, the Council correctly dismissed the Town's appeal.

The Town has not argued or demonstrated that the Council misunderstood RSA 149-M:11 or that the Council misapplied RSA 149-M:11 to the facts alleged by the Town in its notice of appeal. Instead, the Town has argued that the Council must conduct a full-blown hearing on the appeal itself and permit the Town to examine witnesses based solely upon its speculation that facts may emerge during examination that could support its claims. According to the Town, if the Council does not hold a hearing and decide the appeal on its merits, then two things will occur: (a) the Town will be denied its right to an appeal before the Council and (b) the New Hampshire Supreme Court will have an inadequate record to review the Council's decision.

The Town's argument misses the mark because it completely ignores the very purpose of a motion to dismiss. Motions to dismiss are time-saving measures that are *designed and intended* to dispense with a case prior to a hearing, without witness testimony or the presentation of other evidence or argument. While it is true that dismissal of a party's claim denies the party a hearing on the merits, that does not make dismissal improper. An order of dismissal is a recognition that a claim is legally defective and therefore should not proceed to a hearing. To hold a hearing on a claim that is invalid under the law is senseless and wasteful, and dismissal avoids this result.

Thus, if an appellant fails to make the necessary allegations or misunderstands the law, then it is not deprived of its appeal before the Council for the simple reason that there was no basis for the appeal to begin with. Similarly, if the Council dismisses an appeal, then appellant has the right to appeal only the *dismissal* to the New Hampshire Supreme Court. To review the propriety of the Council's order dismissing the appeal, the New Hampshire Supreme Court needs only to review the Town's notice of appeal, NCES's motion to dismiss, the Town's objection to that motion, the transcripts of the

parties' oral arguments before the Council, and the Council's decision. Because the Council did not decide any disputed factual or substantive issues but relied entirely upon the Town's notice of appeal for the factual basis of its dismissal, the New Hampshire Supreme Court will not expect a record containing additional exhibits, testimony, or findings of fact. The Council has created an appropriate record for the New Hampshire Supreme Court to determine whether the Council properly dismissed the Town's appeal.

III. Conclusion

For the above reasons, NCES respectfully requests that the Council deny the Town's request for rehearing of the Council's decision to dismiss the Town's appeal.

Respectfully Submitted,

NORTH COUNTRY ENVIRONMENTAL  
SERVICES, INC.,  
By Its Attorneys,  
BROWN, OLSON & WILSON, P.C.

Date: 7-7-03

By:

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CERTIFICATE OF SERVICE

I hereby certify that the within document was this day forwarded via U.S. Mail, postage prepaid, to Edmund J. Boutin, Esq. and Brenda E. Keith, Esq., Boutin Associates, P.L.L.C., One Buttrick Road, P.O. Box 1107, Londonderry, NH 03053 and to Maureen D. Smith, Senior Assistant Attorney General, Environmental Protection Bureau, Department of Justice, 33 Capitol Street, Concord, NH 03301-6397.

Date: 7-7-03

  
Bryan K. Gould, Esq.